In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. [redacted] 76-642

DOUGLAS LAMARR CHASTEEN,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

On Appeal From the Court of Criminal Appeals of the State of Oklahoma

MOTION TO DISMISS OR AFFIRM

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No. A-295

DOUGLAS LAMARR CHASTEEN,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

On Appeal From the Court of Criminal Appeals of the State of Oklahoma

MOTION TO DISMISS OR AFFIRM

The appellee moves this Honorable Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Criminal Appeals of the State of Oklahoma on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

THE STATE STATUTE INVOLVED

A. The Statute

This appeal raises the question of the validity of certain provisions of the Oklahoma Uniform Controlled Dangerous

Substances Act, 63 O.S. 1971, § 2-401a(1). This section of the statute provides:

> "A. Except as authorized by this act, it shall be unlawful for any person:
>
> "1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance;
>
> "2. To create, distribute, or possess with intent to distribute, a counterfeit controlled dangerous substance.
>
> "B. Any person who violates this section with respect to:
>
> "1. A subtance classified in Schedules I or II which is a narcotic drug or lysergic acid diethylamide (LSD) is guilty of a felony and shall be sentenced to a term of imprisonment for not less than five (5) years nor more than twenty (20) years and a fine of not more than Twenty Thousand Dollars ($20,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation.
>
> "2. Any other controlled dangerous substance classified in Schedule I, II, III, or IV is guilty of a felony and shall be sentenced to a term of imprisonment for not less than two (2) years nor more than ten (10) years and a fine of not more than Five Thousand Dollars ($5,000.00). Such sentence shall not be subject to statutory provisions for suspended sentences, deferred sentences or probation."

Marijuana is classified as a controlled dangerous substance under the provisions of 63 O.S. 1971, § 2-101 (19).

NATURE OF THE CASE

Appellant asserts two questions to be decided in this appeal. First the constitutionality of the statute under which the appellant was convicted and secondly the validity of the search of appellant's home, specifically the execution of the search warrant.

A. Proceedings Below

The appellant, Douglas Lamarr Chasteen, was charged, tried and convicted in the District Court of Tulsa County, Oklahoma, for the offense of Possession of Marijuana with intent to distribute, on April 16, 1975. Following said conviction, the judgment and sentence of seven years in the custody of the Oklahoma Department of Corrections and a fine of $3,500.00 received by the appellant was affirmed by the Oklahoma Court of Criminal Appeals on June 28, 1976. Appellant thereafter filed a Petition for Rehearing with the Oklahoma Court of Criminal Appeals on July 7, 1976, said petition being overruled and the mandate issued on July 12, 1976.

STATEMENT OF THE FACTS

The following statement of facts contains references to page numbers of the trial transcript. Abbreviations such as (Tr. 46) refer to page numbers of the trial transcript.

The appellant waived jury trial (Tr. 3), and the Court proceeded to hear argument on appellant's Motion to Suppress (Tr. 8) and at the close of counsel's argument took the Motion under advisement (Tr. 23).

The State called Officer Donald Wayne Bell as its first witness (Tr. 27). Officer Bell testified he was assigned to

the Narcotics Division of the Tulsa Police Department and was working in such capacity on November 17, 1974. The witness related on November 17, 1974, he obtained a search warrant for the arrest of the appellant at 1335 South Atlantic in Tulsa, Oklahoma. Officer Bell testified the warrant was executed at 8:40 p.m. The witness related he went to the front door of the residence and knocked on the door. The appellant opened the door, the witness advised him of his official capacity, gave him a copy of the search warrant and searched the residence (Tr. 30). Officer Bell related he found a black trunk on the living room floor containing seven plastic containers and one brown paper sack, all containing what he believed to be marijuana. The witness identified State's Exhibit 1 as the trunk found in the appellant's residence and Exhibit 21 as one of the plastic bags containing marijuana found in the trunk (Tr. 32). He also identified Exhibit 3 as a set of scales found in the appellant's living room. The witness further identified several wrapped packets of marijuana found on the floor in the confines of the appellant's living room (Tr. 35). Officer Bell testified after discovering the items now marked as State's exhibits he advised the appellant of his rights. Officer Jackson, who accompanied Officer Bell, then informed the witness he had found another trunk in the bedroom of the appellant's house. The witness related the appellant produced a key to unlock the trunk, wherein 32 pounds of marijuana were contained. Officer Bell related while he was on surveillance of the appellant's residence at 7:15 p.m. on November 17, 1974, he observed William Hurst, a known trafficker in narcotics, enter the house empty-handed and leave the house carrying green bags identical to those previously admitted as State's exhibits (Tr. 44).

Mr. Hurst and his companion were arrested shortly after leaving the residence. Following the testimony of Officer Bell concerning the estimated value of the marijuana and the chain of custody of the evidence seized, from confiscation until trial, the State concluded its direct examination (Tr. 54).

Cross-examination by counsel for defense consisted mainly of questions concerning the issuance and service of a search warrant issued by the Tulsa County District Court for the premises located at 1335 Atlanta in that city and county. The police officer serving the warrant testified that he opened a screen door first, and then knocked on the hard door where he then identified himself as a police officer and gave his authority for entering the premises (Tr. 61). The witness further testified that after conducting a search of an automobile seen coming from the home of the appellant, additional information was added to the Affidavit in support of said search warrant, by hand. The witness further testified that some of the items identified by him had more than one purpose; such as, the plastic baggies and the brown paper sacks and that they could be employed for uses other than the distribution of marijuana.

The State next called Ken Williamson, Forensic Chemist for the Tulsa Police Department (Tr. 74). The parties stipulated to the qualifications of the witness and the witness testified he had examined samples from each of the items marked as State's exhibits. Dr. Williamson related in his opinion all of the samples contained marijuana (Tr. 76). Following the testimony of this witness the State rested (Tr. 78). Thereafter the court overruled defendant's Motion to Suppress (Tr. 82-94) and the defense rested.

ARGUMENT

QUESTION I

THE PROVISIONS OF 63 O.S. 1971, § 2-401A(1) ARE NOT UNCONSTITUTIONALLY VAGUE.

The appellant, Douglas Lamarr Chasteen, asserts the statute under which he was convicted is vague and uncertain in that it fails to specify the meaning of "intent to distribute." Petitioner therefore asserts he is being punished for a state of mind or a status rather than for a specific act.

The Oklahoma statute in question is virtually identical with 21 U.S.C. § 841(a), that section of federal law relating to the manufacture, distribution and possession of controlled substances. The applicable provisions of 21 U.S.C. § 841(a) provide:

> "(a) Except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally—
>
> "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> "(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

Marijuana is classified as a controlled substance under federal law at 21 U.S.C. § 812.

The constitutionality of the above federal statute has been challenged in the Circuit Courts of this country as well as the Federal District Courts upon the same grounds

as presently urged by the petitioner in challenging the Oklahoma statute. In *United States* v. *King,* 485 F.2d 353 (10th Cir. 1973), the United States Court of Appeals for the Tenth Circuit considered an argument wherein the defendant, King, asserted 21 U.S.C. § 841a(1) was unconstitutionally vague in that it failed to state "how much" of the controlled substance was necessary to permit the inference that the possessor had the intent to distribute. The Tenth Circuit Court in considering the above argument stated:

> "The statute clearly, and without vagueness, makes unlawful the possession of any controlled substance with an intent to distribute. The question as to the quantity which would permit the inference that the possessor had an intent to distribute is evidentiary in nature and necessarily depends upon all the facts and circumstances of the case at hand, and mention thereof in the statute is entirely unnecessary."

United States v. *King, supra,* was later cited with approval in *United States* v. *Martinez,* 507 F.2d 58 (10th Cir. 1974), when the issue of the vagueness of 21 U.S.C. § 841a(1) was challenged again on constitutional grounds.

This Court in *United States* v. *Harriss,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), related the constitutional requirement of definiteness in considering whether a statute is vague when it stated:

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

"On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise. *United States* v. *Petrillo,* 332 U.S. 1, 7, 91 L.Ed. 1877, 1882, 67 S.Ct. 1538. Cf. *Jordan* v. *DeGeorge,* 341 U.S. 223, 231, 95 L.Ed. 886, 893, 71 S.Ct. 703. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction."

Further, in *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963), this Court in discussing the manner in which a statute must be viewed when considering the vagueness doctrine, stated:

"In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged."

The Oklahoma Court of Criminal Appeals construed the intent to distribute element of the crime of possession of marijuana with intent to distribute in *Reynolds* v. *State,* Okl.Cr., 511 P.2d 1145 (1973). In *Reynolds, supra,* the Oklahoma Court of Criminal Appeals quoting from their decision in *Murphy* v. *State,* 79 Okl.Cr. 31, 151 P.2d 69 (1944), stated:

"Where intent is necessary in the commission of a crime, it is a question for the jury, under the facts and circumstances, of each individual case. It may be proved by direct or circumstantial evidence.

"It is therefore our opinion that the 'intent to distribute' is a fact question for the jury, to be submitted to them under proper instructions."

In the instant case, the evidence at trial revealed the defendant was in possession of a large quantity of marijuana, wrappers and packages which are commonly used for the distribution of marijuana, and of scales used for the weight, measuring and cutting of marijuana.

The State of Oklahoma would further show this Court 21 U.S.C. § 841a(1) has been upheld constitutionally as against the vagueness argument by the United States District Court for the Western District of Pennsylvania in *United States* v. *Moses,* 360 F.Supp. 301 (W.D. Penn. 1973), and the United States District Court for the Eastern District of Wisconsin in *United States* v. *Herrman,* 371 F.Supp. 343 (E.D. Wis. 1974). The argument posed by the petitioner with reference to the Oklahoma statute's alleged prosecution for a state of mind rather than act was raised in respect to 21 U.S.C. § 841a(1) in the United States District Court of Massachusetts. In *United States* v. *DiLaura,* 394 F.Supp. 770 (D. Mass. 1974), Judge Murray stated:

"There is no merit to defendant's contention that 21 U.S.C. § 841 penalizes a state of mind in violation of the Fifth Amendment. Congress could reasonably find a distinction between the mere act of possession of a Schedule II drug with intent to distribute it, 21 U.S.C. § 841, as related to personality, social and economic factors. Thus Congress could rationally provide for different penalties in seeking to control distribution and traffic in Schedule II drugs."

See also *United States* v. *Hobbs,* 392 F.Supp. 444 (D. Mass. 1975).

Therefore, the State of Oklahoma would submit 63 O.S. 1971 § 2-401a(1) is not vague and uncertain as the appel-

lant contends. The courts of the Federal Judicial system have consistently refused to accept a similar argument in challenging the constitutionality of 21 U.S.C. § 841a(1), a criminal statute virtually identical to the present Oklahoma statute in question. As such, the appellant in the present case has not been denied his Sixth Amendment right to be informed of the nature and the cause of the accusation against him.

QUESTION II

THE EXECUTION OF THE SEARCH WARRANT AND THE SEARCH OF THE APPELLANT'S PREMISES DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS.

Appellant asserts his Fourth Amendment rights were violated when the Tulsa police officers executed the search warrant. In the present case Officer Bell of the Tulsa Police Department testified in executing the search warrant at the appellant's residence he opened a screen door, knocked on a closed front door, waited until the petitioner answered the door, identified himself and gave his authority for entering the premises. The officer did not gain access to the interior of the appellant's residence until the appellant himself opened the front door and the officer stated his purpose and authority for the search of the appellant's residence.

The provision, in the Fourth Amendment to the United States Constitution, requiring search warrants before an invasion of one's home, is predicated upon the right to privacy. *United States* v. *Graham*, 391 F.2d 439, *cert. den.* 390 U.S. 1035, 88 S.Ct. 1422, 20 L.Ed.2d 294 (C.A. Tenn.

1968). The appellant's privacy has not been violated in the present case by the actions of the officer in opening the screen door in order to knock on the closed front door of the appellant's residence.

Appellant further asserts the decision in *Sabbath* v. *United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968), needs clarification or extension to cover the situation presented in the present case. The appellee would disagree and show this Court in *Sabbath, supra,* the Court speaks of an unannounced intrusion *into* a dwelling. The word "into" as defined by Black's Law Dictionary provides:

> " 'INTO'. A preposition signifying to the inside of; within. It expresses entrance, or a passage from the outside of a thing to its interior, and follows verbs expressing motion. It has been held equivalent to, or synonymous with, 'at,' 'inside of,' and 'to,' and has been distinguished from the words 'from' and 'through.' 48 C.J.S. p. 120."

The State of Oklahoma would submit the meaning of *Sabbath, supra,* is clear on its face. It implies a prohibition against an unannounced intrusion whereby one gains access to the interior of the dwelling. Such a procedure would obviously violate the Fourth Amendment to the United States Constitution as well as the individual's right to privacy. Inasmuch as the Fourth Amendment requirement for search warrants before an invasion of one's home is predicated on the individual's right to privacy, the actions of the officer, in the present case sufficiently protected the petitioner's right to privacy. Officer Bell did not obtain access to the interior of the appellant's home by his actions in opening a screen door and knocking on the closed front

door. Nowhere in the record does it appear Officer Bell entered the appellant's home without first giving his identity and authority for such a search.

The State of Oklahoma would respectfully show this Court the appellant's right to privacy was not violated and there is no need for clarification of the decision by this Court in *Sabbath* v. *United States, supra.*

CONCLUSION

The provisions of 63 O.S. 1971, § 2-401a(1) are not unconstitutionally vague and the search of the appellant's residence was properly performed within the constitutional guidelines as enunciated by this Court. This Court has previously held an appeal may be affirmed on motion when the questions presented are unsubstantial. *Del Pozo* v. *Wilson Cypress Co.*, 269 U.S. 82, 46 S.Ct. 57, 70 L.Ed. 172, *rehearing den.* (U.S.), 47 S.Ct. 235, 71 L.Ed. 1339 (1925); *Boston* v. *Jackson*, 260 U.S. 309, 43 S.Ct. 129, 67 L.Ed. 274 (1922).

Wherefore, respondent respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, respondent respectfully moves this Court to dismiss this appeal or in the

alternative, to affirm the judgment entered in this cause by the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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December, 1976

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the instrument to which this certification is attached, were mailed to the following named counsel, this ..... day of December, 1976:

Mr. Ed R. Crockett
3733 East 31st Street
Tulsa, Oklahoma 74135
Attorney for Petitioner

Robert L. McDonald